

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

<i>In the Matter of</i>)	
)	
Advanced Methods to Target and Eliminate)	CG Docket No. 17-59
Unlawful Robocalls)	

Comments of the Credit Union National Association

The Credit Union National Association (“CUNA”), by and through its counsel, submits these comments in response to the *Second Further Notice of Proposed Rulemaking* released by the Federal Communications Commission (“Commission”) on March 23, 2018.¹ As reflected in its comments to the Commission’s Notice of Inquiry in this proceeding, CUNA supports the creation of a robust, comprehensive reassigned numbers database, and welcomes this next step in the process.

Background

Serving America’s credit unions and their 110 million members, CUNA is the nation’s largest credit union association. Credit unions are tax-exempt nonprofit, member-owned institutions. As financial cooperatives, their members are also owners and enjoy democratic control in electing those setting policy and making decisions for the credit union. Communication between the credit union and its members is critical given the important role credit union member-owners play in the organization. Credit unions communicate not only crucial, time-sensitive financial-related information such as account balances or overdrafts,

¹ *In the Matter of Methods to Target and Eliminate Unlawful Robocalls*, Second Further Notice of Proposed Rulemaking, CG Docket No. 17-59, FCC 18-31 (rel. March. 23, 2018) (“*Second Further Notice*”).

security breaches, fraud alerts, and debt default avoidance or resolution, but also information about credit union governance and voting issues. In short, credit union communications are mostly informational and the target audience comprises credit union member-owners.

Despite the limited, informational nature of their communications, credit unions nonetheless find themselves the target of frivolous TCPA litigation. A recurring concern is reassigned numbers. Like telephone consumers generally, credit union members frequently change their contact numbers that were provided to the credit union, and do not necessarily think to immediately inform the credit union of the change. The credit union may then call the number to provide information without any knowledge that the number has been reassigned, potentially exposing it and its member-owners to liability. CUNA and its members are thus keenly interested in this proceeding.

I. Operational Issues

CUNA supports the establishment of a single, centralized and comprehensive database to which all providers with access to telephone numbers should report reassigned numbers.² Because the majority of credit unions are small businesses with limited resources, access to the database must be affordable (discussed below) and its use should be as straightforward and easy as possible. CUNA therefore agrees with the Commission's statement that a reassigned numbers database should "be easy to use and cost-effective for callers while minimizing the burden on service providers supplying the data."³

The Commission's expectation that the caller would possess information such as the name of the credit union member and the last provided telephone number is correct. Somewhat

² The Commission asks whether providers of texting services should be required to report reassigned numbers used for texting. *See Second Further Notice*, ¶ 39. As long as senders of texts could be liable for sending a text to a reassigned number, text message service providers should report reassigned numbers to the database.

³ *Second Further Notice*, at ¶ 11.

less clear is whether credit unions in all instances could pinpoint with confidence the last date that its member was still associated with the number. The credit union must rely on the database to indicate whether the number that it does have has been reassigned (and when the reassignment occurred, if available). The Commission should initially seek to populate the database with number reassignment information going back as far as possible, but at least two years.

As the *Second Further Notice* suggests, a caller should be able to submit one or more telephone numbers and receive a yes or no indication as to whether it has been reassigned. There is no need to reveal any information about the current subscriber. To the extent feasible, providing the date of reassignment to a credit union attempting to reach one of its members with whom it has not communicated in some time would be useful. CUNA also recommends adopting an easily accessible file format such as comma-separated values (CSV).

The Commission proposes to identify a reassigned number—for database purposes—as a number that has been disconnected. CUNA agrees that utilizing “number disconnection” as the event that would trigger notification to the database would provide the most lead time for callers to make adjustments to their internal information. CUNA also agrees that the database should exclude temporary disconnects or suspensions due, for example, to the subscriber’s failure to make a payment. Such numbers may be reconnected upon payment and would thus create a false record were they to be identified as reassigned.

II. Access to the Database Must be Affordable

The *Second Further Notice* seeks comment on how to balance the need to compensate providers for the cost of populating the database with the need for affordable access so as to encourage its use by small businesses.⁴ The Commission is correct to note that smaller companies may not use the database if access is not affordable. Many credit unions are very

⁴ *Second Further Notice*, at ¶ 29.

small businesses. Nearly half of all credit unions, 2,709 out of approximately 6,000 credit unions, have five or fewer full time employees and the majority have assets of less than \$20 million. Cost of access will thus be a critical factor in their determination of whether to utilize the database.

The fee structure established for the do not call registry can provide some guidance on ways to minimize cost. Users of the do not call registry pay a per area code fee, currently set \$62 per area code with a cap of \$17,021, and the first five area codes are free.⁵ The Commission should consider a similar structure. Most credit unions serve severely limited geographic areas. Under the Federal Credit Union Act, credit unions must restrict their membership to reflect a common bond of occupation or association.⁶ Often, credit union membership may be restricted to individuals living or working in discrete geographic areas, such as several counties within a state. These credit unions would only need access for one or a few area codes.⁷ Fees for accessing the database should thus be calibrated to the extent of use and, like the do not call registry, de minimis usage should be free. The Commission previously endorsed a fee structure for access to the do not call list that considered the needs of organizations conducting business on a regional, state or local level.⁸

⁵ Users of the do not call registry pay a per area code fee (to be set at \$62 per area code with a cap of \$17,021 beginning in FY 2018) with the first five area codes free. See, e.g., Telemarketer Fees to Access Do Not Call Registry to Rise Slightly in 2018, Aug. 14, 2017, <https://www.ftc.gov/news-events/press-releases/2017/08/telemarketer-fees-access-ftcs-do-not-call-registry-rise-slightly> (last visited June 7, 2018).

⁶ See 12 U.S.C. § 1759(b)(1)-(3).

⁷ Credit unions may also need access on a number-by-number basis. For example, a credit union member may only use a cell phone and may have maintained a wireless number from a distant area code that is not within the credit union's standard area of operation.

⁸ *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd 14014, 14048-49, ¶ 54 (2003) (2003 TCPA Order).

Moreover, access to the do not call registry is free for tax exempt organizations, entities that do not engage in telemarketing, or entities that only contact their own customers.⁹ Credit unions fit one or more of these qualifications. Credit unions are tax-exempt, non-profit organizations under the IRS code and attempt to provide informational messages only to their members with whom they have an established business relationship.¹⁰ The Commission should similarly provide free access for tax exempt, non-profit organizations and/or those that only call customers with whom they have an established business relationship.

III. The Commission Should Establish a Safe Harbor

Responses to the *NOI*, including CUNA's comments, overwhelmingly endorsed creation of a safe harbor for callers that utilize the reassigned number database.¹¹ CUNA concurs with the Commission's proposal not to mandate use of the database. Given that use would be voluntary, a safe harbor would provide strong incentive to utilize the database. The Commission seeks further comment on how such a safe harbor should be used and its authority to implement a safe harbor.

CUNA believes that a reassigned numbers database safe harbor should be structured along the lines of the safe harbor established for the national do not call list.¹² Under that approach, a caller that demonstrates that, as part of its routine business practice, it checks numbers against the do not call database is precluded from liability for erroneously calling a

⁹ The Federal Trade Commission rules provide free access to the do not call registry for entities that qualify as "exempt organizations," including certain tax-exempt nonprofit organizations, entities that do not make telemarketing calls or those that only contact their own customers. *See* National Do Not Call Registry, Information for Businesses, <https://www.donotcall.gov/faq/faqbusiness.aspx#payforAccess> (last visited June 7, 2018). *See also*, 2003 TCPA Order, 18 FCC Rcd at 14044, ¶¶ 42-45.

¹⁰ *See* 26 U.S.C. § 501(c)(1) (exempting federal credit unions under the supervision of the National Credit Union Association); *id.* at § 501(c)(14)(A) (exempting credit unions chartered under state credit union laws that operate without profit).

¹¹ *See*, Reply Comments of the Credit Union National Association, WC Docket No. 17-59, at 5-6 (filed September 26, 2017). *See also* Second Further Notice, at ¶ 31.

¹² *See* 47 C.F.R. § 64.1200(c)(2).

number on that list. To qualify for the safe harbor, the caller must show that it has developed written compliance procedures, trained its personnel, and that it can document that it scrubbed its numbers against the numbers on the do not call list “no more than 31 days prior to the date any call is made.”¹³ Documented use of the reassigned number database should act as a complete defense from liability for calling a reassigned number, absent actual knowledge of the reassignment.

The Commission has ample authority under Section 227 to establish a safe harbor as confirmed by D.C. Circuit’s discussion in *ACA International*.¹⁴ There, after concluding that the Commission’s interpretation of “called party” as the current subscriber of the number was not precluded by the TCPA (but also not compelled),¹⁵ the Court went on to assess the Commission’s establishment of a one-call safe harbor. Importantly, the Court upheld the Commission’s interpretation of the TCPA that a caller could reasonably rely on the prior express consent to be called that was previously conferred by the intended recipient of the call (or text). Given the Commission’s appropriate use of reasonable reliance as justification for the one-call safe harbor, the Court also concluded that it was arbitrary and capricious to impose liability after just one call if the caller still had no knowledge of reassignment.¹⁶

The Court also pointed to the current proceeding to establish a comprehensive reassigned numbers database coupled with a safe harbor “for callers that inadvertently reach reassigned numbers after consulting the most recently updated database.” In no uncertain terms, the Court

¹³ See *id.* §64.1200(c)(2)(i). See also, Federal Trade Commission, Q&A for Telemarketers & Sellers About DNC Provisions in the TSR, available at <https://www.ftc.gov/tips-advice/business-center/guidance/qa-telemarketers-sellers-about-dnc-provisions-tsr> (last visited June 7, 2018).

¹⁴ *ACA International v. FCC*, 885 F.3d 687 (D.C. Cir. 2018) (“*ACA International*”).

¹⁵ The Court clearly left open an interpretation of “called party” as the intended recipient. *ACA International*, 885 F.3d at 706.

¹⁶ As the Court stated, having “embraced an interpretation of the statutory phrase ‘prior express consent’ grounded in conceptions of reasonable reliance, the Commission needed to give some reasoned (and reasonable) explanation of why it’s safe harbor stopped at the seemingly arbitrary point of a single call or message. The Commission did not do so.” *ACA International*, 885 F.3d at 708.

signaled that these proposals would “have a greater potential to give full effect to the Commission’s principle of reasonable reliance.”¹⁷ The Commission should follow the Court’s roadmap that “reasonable reliance” provides authority for an appropriately constructed safe harbor. It should reaffirm the “principle of reasonable reliance” in interpreting the phrase “express prior consent” and find that it would be reasonable for a caller to rely on that prior consent where its consultation with the database indicates that the number being called or texted had not been reassigned.

CONCLUSION

The Commission should establish a comprehensive, easy-to-use and affordable reassigned numbers database and provide a safe harbor from TCPA liability for calling a reassigned number where the caller utilized the database.

Respectfully submitted,

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¹⁷ *ACA International*, 885 F.3d at 709.